Office-Supreme Court, U.S.
FILED
AUG 23 1965
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 483

FREDERICK GRAY,
Petitioner,

vs.

LAWRENCE E. WILSON, Warden of San Quentin Prison,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

MARSHALL W. KRAUSE,
Staff Counsel,
American Civil Liberties Union
of Northern California,
503 Market Street,
San Francisco, California 94105,

LAWRENCE SPEISER,
1101 Vermont Avenue, N. W.,
Washington, D. C.,
Attorneys for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions and statute involved	3
Statement of the case	4
Reasons for granting the writ	12
Conclusion	25

Table of Authorities Cited

Cases	Pages
Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962)	20
Carnley v. Cochran, 369 U.S. 506	24
Coffin v. Reichard, 143 F.2d 443 (1944)	14
Ex parte Hull, 312 U.S. 546 (1941)	16, 17
Fay v. Noia, 372 U.S. 391 (1963)	16, 17, 22, 23, 24, 25
Gideon v. Wainwright, 372 U.S. 395	22
Gray v. Wilson, 230 F.Supp. 860 (1964)	2
Henry v. Mississippi, ... U.S. ....., 13 L.Ed.2d 408	22, 23, 24
In re Bonner, 151 U.S. 242 (1894)	14
Johnson v. Zerbst, 304 U.S. 458	10, 14, 24, 25
McNally v. Hill, 293 U.S. 131 (1934)	15, 16, 17
Nelson v. California, 346 F.2d 73 (9th Cir. 1965)	25
Patton v. United States, 281 U.S. 276	24
Poe v. United States, 233 F.Supp. 173 (D.D.C. 1964)	22
Pointer v. Texas, ... U.S. ....., 13 L.Ed.2d 923 (1965)	19
Rhay v. Browder, 342 F.2d 345 (9th Cir. 1965)	25
Sunal v. Large, 332 U.S. 174	15

Pages

United States ex rel. Durocher v. Lavalee, 330 F.2d 303 (en banc, 1964) 13
United States ex rel. Smith v. Jackson, 234 F.2d 742 (1956) 13
United States ex rel. Smith v. Martin, 242 F.2d 701 (1957) 13
United States v. Fay, 184 F.Supp. 535 (1960) 13
United States v. Muniz, 374 U.S. 150 14

Wilson v. Gray, 345 F.2d 282 (1965) 2

Codes

California Penal Code, Section 245 5

Statutes

28 United States Code:
Section 1254(1) 2
Section 2241, et seq. 4
Section 2243 ..... 4, 14
Section 2254 4

Constitutions

United States Constitution:
Article I, Section 9 4
Fourth Amendment 18
Sixth Amendment 4, 18
Fourteenth Amendment 3, 9

Rules

Federal Rules of Civil Procedure, Section 52(a) 11

Texts

California Adult Authority, Principles, Policies and Program (5th Ed., 1952), pp. 8-9 18

California Department of Corrections, Biennial Report 1957-58, p. 40 18

Continuing Education of the Bar, California Criminal Law Practice (1965), p. 241 22

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No.

FREDERICK GRAY,
Petitioner,

vs.

LAWRENCE E. WILSON, Warden of San Quentin Prison,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Frederick Gray respectfully petitions that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the decision and judgment of that court reversing the granting of a writ of habeas corpus by the district court, dismissing the proceeding and remanding petitioner to the custody of respondent.

OPINIONS BELOW

The opinion of Judge Zirpoli for the United States District Court for the Northern District of Califor-

nia, Southern Division (Appendix I) is reported as *Gray v. Wilson,* 230 F.Supp. 860 (1964). The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix II) (per Judges Hamlin, Hamley and Duniway) is reported as *Wilson v. Gray,* 345 F.2d 282 (1965). There were no state court opinions. The judgment of the Court of Appeals is attached hereto as Appendix III and that court's order denying rehearing is attached hereto as Appendix IV.

JURISDICTION

The decision and judgment of the United States Court of Appeals for the Ninth Circuit was made and entered on April 21, 1965. A timely petition for rehearing was denied on May 26, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

The questions presented by this petition were raised and denied without opinion in the Superior Court, District Court of Appeal and the Supreme Court of the State of California in habeas corpus proceedings[1] and were raised, briefed and argued before both courts below.

QUESTIONS PRESENTED

I

Whether a federal district court has jurisdiction to hear the habeas corpus petition of a state prisoner

---

[1]Of course, the state courts did not consider problems peculiar to the jurisdiction of the federal courts in habeas corpus actions by state prisoners.

whose opportunity for state relief has been exhausted where that prisoner is serving two concurrent sentences the second of which, *arguendo,* is unconstitutional and the first of which is the result of the revocation of probation as to which the illegal second conviction was at least a substantial factor.

II

Whether the Fourteenth Amendment to the Constitution of the United States and its guarantee of the right to a fair trial in a criminal proceeding are violated where, without the consent or understanding of the accused, a state-appointed attorney waives the right to confront and cross-examine all prosecution witnesses.

III

Whether the Fourteenth Amendment to the Constitution of the United States and its guarantee of the right to a fair trial in a criminal proceeding are violated where an accused's state-appointed attorney waives the right to a trial and submits the accused's case on the transcript of a preliminary examination without further testimony or argument, all without the consent or understanding of the accused.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitution of the United States, Fourteenth Amendment, Due Process Clause:

"... nor shall any State deprive any person of life, liberty, or property, without due process of law; ...."

Constitution of the United States, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the assistance of counsel for his defense."

28 U.S.C. § 2243:

"* * *

"The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

STATEMENT OF THE CASE

Petitioner filed his application for the writ of habeas corpus on November 6, 1963 (Clerk's Transcript [C. T.] 1-3) under the authority of 28 U.S.C. §§ 2241, et seq. and Article I, section 9 of the Constitution of the United States. It was first denied on the basis that petitioner failed to allege facts showing he had exhausted his state remedies as required by 28 U.S.C. § 2254. After petitioner filed supplementary documents showing exhaustion of state remedies (C.T. 36-42) the case was re-opened and an order to show cause issued. Respondent then filed a return (C.T. 56) to which was annexed the record of the state proceedings.

The district court held a hearing on April 9 and April 30, 1964, at which petitioner, his court-appointed attorney in the state proceedings, and a deputy sheriff testified. The Reporter's Transcript (hereafter "R.T.") of this hearing as well as the clerk's transcript have been certified to this Court. The facts developed from the pleadings and hearings are as follows:

1. On June 30, 1961, petitioner pled guilty to a violation of California Penal Code sec. 245, assault by means of force likely to produce great bodily injury. He was not sentenced to prison but rather was placed on probation.

2. On March 18, 1962, petitioner was arrested and charged with a violation of the same Penal Code section for an alleged assault on the same person, his wife.

3. On March 26, 1962, petitioner, still in custody, was accorded a preliminary examination on this charge (C.T. 69-79) where he was represented by Los Angeles County Deputy Public Defender Morton Levy. Petitioner's wife testified that her husband of sixteen years and the father of her ten children came home "drunk" and after an argument stuck her in the arm with an ice pick. Mrs. Gray said she would inform the police and then petitioner ("he just looked like he went haywire then") stuck her twice more. This was the sole testimony. Mrs. Gray was cross-examined by Mr. Levy. Petitioner was held to answer and remained in custody for inability to post bail.

4. Petitioner was arraigned and entered his plea (for which proceedings he was represented by a new deputy public defender on each occasion, C.T. 86, 87) and the date for his jury trial was set for May 10, 1962.

5. On the date of petitioner's trial his fourth counsel, deputy public defender Fred Kilbride, announced that petitioner would waive his right to jury trial and petitioner's personal waiver was taken for the record after it had been carefully ascertained that he knew the substance of the right (C.T. 90, set out as footnote 1 to the opinion of the district court, Appendix I, *infra*). The prosecutor then offered a stipulation (C.T. 91) that the people's case would be the transcript of the preliminary hearing with the witness in that proceeding being deemed to have testified in the "trial" as if she had been called, duly sworn and testified in exactly the same way. The right to present additional evidence was reserved to both sides. Defense counsel immediately stated, "I join in that stipulation, your Honor" (C.T. 92). The judge then read the transcript of the preliminary examination. The prosecutor rested his case and defense counsel rested his case without producing any evidence. The people's counsel waived argument and defense counsel waived argument. The court immediately found the petitioner guilty.[2]

---

[2]Petitioner was found guilty of "assault by force likely to produce great bodily injury," an offense under the same section as charged but not disqualifying petitioner for probation as would a conviction of "assault with a deadly weapon."

Throughout these proceedings, which occupy but 57 lines of transcript, petitioner did not say one word nor was he asked one question after his personal waiver of his constitutional right to a jury trial was taken. It nowhere appears in the state court record that petitioner ever agreed to or understood the procedure whereby he was to have no trial, was to waive the right to confront and cross-examine witnesses, and was to have the question of his guilt submitted to a judge without further evidence or argument.

6. The issue of the existence of prior convictions was then submitted to the judge[3] and the court granted defense counsel's motion for a probation hearing and a psychiatric evaluation of petitioner's mental condition.[4] When proceedings recommenced on June 1, 1962, probation was denied and petitioner was sentenced to state prison. The court then took up the matter of the earlier conviction as follows (C.T. 103):

> "We will now take up the other case, 241385, which is a hearing on violation of probation. You have read the Probation Officer's report relative to that case?
>
> Mr. Kilbride: Yes, your Honor.
>
> The Court: By reason of the commission by the defendant of the offense as to which he was convicted in case number 256751 and as to which he has just been sentenced to the State

[3]The court found one of the prior convictions not true (C.T. 99) and made no finding on the other as it was the conviction as to which the sentence of probation was revoked (see *infra*).

[4]The psychiatrist's report indicated petitioner suffered from brain impairment from excessive use of alcohol (C.T. 99). See also the evaluation of petitioner in Appendx V, *infra*.

Prison, the Court finds the defendant in violation of probation in this case 241385 and revokes the order heretofore made granting the defendant probation. Is the defendant ready for arraignment for judgment and sentence?

Mr. Kilbride: Yes, your Honor.

The Court: Is arraignment for judgment and sentence waived?

Mr. Kilbride: It is, your Honor.

The Court: Is there any legal cause to show why the judgment of this Court should not now be pronounced and sentence imposed?

Mr. Kilbride: There is none, your Honor."

The court again considered the probation officer's report and the psychiatrist's report and again sentenced petitioner to state prison, the sentence to run concurrently with the sentence just imposed (C.T. 104).

7. No appeal was filed,[5] but petitioner unsuccessfully sought state collateral relief. In his federal petition, filed *pro se,* he complained of the deprivation of the right to confront and cross-examine witnesses against him and stated, "I was still looking for a trial" (C.T. 2). In his supporting points and authorities petitioner indicated that his appointed counsel acted without his consent or understanding and attacked both of his convictions, stating that the revocation of probation on the first charge was "because of his illegal conviction" (C.T. 6) and stating that there

[5]"I fail to put in an appeal because I was scared after the way I had been done, and no one advised me that I could." Petition, C.T. 3.

were no other grounds for probation violation. He further stated that he was denied "a chance to testify in his own behalf" (C.T. 9).

8. At the hearing on the petition in the federal district court petitioner testified that he did not consent to the submission of his case on the transcript of the preliminary hearing (R.T. 5, set forth in the opinion of the district court, Appendix I, *infra*) and that neither the judge nor the public defender explained to him the consequences of such a submission. He testified that Mr. Kilbride had never consulted with him but that just before court opened the public defender spoke to each of the defendants whom he was defending that morning and told them what he thought would happen; his prediction to petitioner was, "You are going to the penitentiary" (C.T. 7-8).

Mr. Kilbride was called by the State of California and testified that he did consult with petitioner and informed him that his advice was to submit the matter on the transcript of the preliminary examination and petitioner did not object (R.T. 17).

9. The decision of the district court (Appendix I) held the right to confront and cross-examine prosecution witnesses to be guaranteed by the due process clause of the Fourteenth Amendment. The trial judge then found that the procedure described above violated the Fourteenth Amendment because petitioner did not knowingly consent to a waiver of his rights. The judge further reasoned that there is a difference between the trial tactic of failing to cross-examine a

witness, and the submission of the issue of guilt or innocence on the cold record of a transcript. He held the former, but not the latter, could be made by counsel alone. From his practical knowledge of state court proceedings the trial court found that the latter procedure is often nothing more than a "slow plea of guilty." The trial court held that the alleged waiver of petitioner's constitutional rights in these circumstances must be tested by the *Johnson v. Zerbst* (304 U.S. 458) standard of "an intentional relinquishment or abandonment of a known right or privilege."

Since the record did not indicate a knowing waiver, the trial court was required to make factual findings. Taking into account the facts that deputy public defender Kilbride has approximately 140 felony trials per year representing some 300 defendants, that Kilbride's testimony was that his main object in this case was to present a good claim for probation rather than "seriously adjudicate the question of guilt or innocence,"[6] that Kilbride's recollection of events two years in the past was clouded by the fact that he handled several hundred other similar cases, that Kilbride's recollection of details was very hazy, and that Kilbride testified as to his "best recollection" rather than positively, the court found that there was no knowing waiver of petitioner's constitutional rights.

The trial court also found that probation was revoked on the prior conviction because of the second conviction and that therefore confinement is invalid

[6]Opinion of the District Court, Appendix I, *infra*, p. 13.

on both convictions if the more recent conviction is invalid. The court did not order petitioner discharged but ordered him remanded to the state courts for further proceedings, presumably a new trial on the second charge and a new decision on probation revocation on the first charge.

10. The trial court denied petitioner release on bail as did the court of appeals. On application, Justice Douglas ordered petitioner released on bail in the sum of $5,000 and petitioner has been out of custody since September of 1964.

11. The Court of Appeals reversed on two grounds. First, the district court was without jurisdiction to act since, even if the second conviction is invalid, the concurrent sentence imposed after revocation of probation was not based "solely" on the second conviction and thus stands as a lawful commitment depriving federal courts of habeas corpus jurisdiction. The finding of the district court that the revocation was "because of" the second conviction was held "clearly erroneous" under F.R. Civil Proc. 52(a) and thus the district court lacked jurisdiction because its writ would not result in a "discharge from custody."

Second, the court of appeals reversed on the merits of the constitutional claim. What was involved, said the court, was a tactical decision of counsel. Since counsel is "the manager of the lawsuit," a client must be bound by his decisions even when, as the Court of Appeals accepted as true in this case, substantial constitutional rights are waived without his consent or understanding.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals should be reviewed by this Court because its holding on the law governing the jurisdiction of federal courts in habeas corpus matters is in conflict with the law which pertains to identical questions in the Second and Sixth circuits. In addition, the holding concerning the necessity of a "discharge from custody" raises an important and recurring question of federal jurisdiction which has not been settled by decisions of this Court and as to which the district courts are in need of guidance.

The second and third questions presented by this petition raise a central constitutional problem with respect to the authority of counsel to bind a defendant to the waiver of basic rights where federal courts have found that the defendant neither consented to such a waiver nor understood that he had the rights which were surrendered for him by counsel. In our case the rights waived by counsel without consent or understanding by his client (under the widespread practice in state criminal procedure of submission of a case on a transcript of a preliminary hearing) were the rights to confront and cross-examine prosecution witnesses and, in effect, the right to contest the issue of guilt and present a defense. The scope of counsel's authority in these respects is an important question of federal law which should be settled by this Court to make basic constitutional rights more meaningful to persons accused of crimes.

1. The Ninth Circuit has held in this case that district courts have no jurisdiction in habeas corpus petitions where "discharge from custody" will not follow the granting of relief. In direct conflict, the Second Circuit holds that in every case where there is a *possibility* that an invalid second conviction might affect imprisonment on a valid conviction, federal habeas is available without regard to whether discharge from custody will invariably follow. *United States ex rel. Smith v. Jackson,* 234 F.2d 742, 749 (1956); *United States ex rel. Smith v. Martin,* 242 F.2d 701 (1957); *United States ex rel. Durocher v. Lavalee,* 330 F.2d 303 [note 2] (*en banc,* 1964); *United States v. Fay,* 184 F.Supp. 535, 538-39 (1960). In the *Jackson* case, for example, the petitioner attacked a fifteen year sentence as a second offender on the ground that his first conviction was unconstitutional and therefore he could not be sentenced as a second offender. The state answered that petitioner had not yet served the maximum sentence as a first offender and therefore the case was not ripe for federal review. The court determined that the illegal conviction "might" affect the prisoner's chance for parole on the legal conviction and, in any event, he was entitled to be re-sentenced as a first offender because there was no reason to assume that he would have received the maximum sentence had he been sentenced as a first offender. And in *Durocher* the court held:

> "This possibility [that there might be a shorter sentence] is enough to warrant the issuance of a federal writ of habeas corpus."

Certainly under the Second Circuit rule the district court would have had jurisdiction in this case no matter how the facts are viewed. The illegal second conviction was foremost in the factors considered by the state judge in revoking probation and, had it not existed, it is doubtful that there would have been any prison sentence at all.

The Second Circuit is not alone in its disagreement with the Ninth Circuit. The Sixth Circuit also does not require that "discharge from custody" follow the granting of the writ. In *Coffin v. Reichard,* 143 F.2d 443 (1944), the prisoner alleged he was subjected to brutal treatment in prison. The court held that federal habeas corpus was available to a prisoner who

> "through lawfully in custody, is deprived of some right to which he is lawfully entitled . . . the deprivation of which serves to make his imprisonment more burdensome than the law allows . . . ."[7]

In addition, the rigorous rule of the Ninth Circuit would seem to be in conflict with the historical use of habeas corpus, as traced in *Johnson v. Zerbst,* 304 U.S. 458, 466, to "dispose of the party as law and justice require."[8] See also Justice Field's opinion in *In re Bonner,* 151 U.S. 242 (1894) and Justice Frankfurter's views on appropriate use of federal habeas

---

[7]In *United States v. Muniz,* 374 U.S. 150, this Court cited *Coffin v. Reichard* with approval (374 U.S. at 164, n. 25).

[8]In the 1948 codification the language was changed to its present form, "dispose of the matter as law and justice require." 28 U.S.C. §2243.

corpus in *Sunal v. Large,* 332 U.S. 174, 184 (dissenting opinion).

The controversy over whether "immediate release from custody" is a condition for federal habeas corpus relief has created differing standards of federal constitutional concern in an area where there is an obvious need for uniformity. The Ninth Circuit bases its rule on supposed compliance with *McNally v. Hill,* 293 U.S. 131 (1934). We show below that *McNally* neither requires nor supports the Ninth Circuit rule.

In *McNally v. Hill* the applicant for the writ of habeas corpus attacked the validity of a sentence he had not yet begun to serve but alleged that if the sentence were held void he would be *eligible* for parole on the sentence he was then serving. Justice Stone wrote, "Wherever the issue has been presented, this Court has consistently refused to review, upon *habeas corpus,* questions which do not concern the lawfulness of the detention." (293 U.S. at 139.) In *McNally,* the question raised by the writ "even if determined in the prisoner's favor, could not have resulted in his immediate release." (293 U.S. at 138.) The Court suggested that the prisoner's remedy was a proceeding in mandamus against the Parole Board to consider his petition for parole.

In our case the *McNally v. Hill* criteria are satisfied. Petitioner attacks the validity of both *sentences* he is serving but claims that only the second of his two *convictions* is illegal. He alleges (and the district court so held) that the sentence on the first conviction

is illegal because it would not have been imposed but for the illegal second conviction and sentence. Clearly then the questions petitioner raises "concern the lawfulness of the detention" and could result in immediate release as required by *McNally v. Hill.*

The granting of the writ of habeas corpus by Judge Zirpoli was not an idle act, but required the State of California to do one of two things: (1) Release petitioner from custody, or (2) rescind the revocation of probation on the first conviction and grant him a new trial on the second conviction.[9] This is quite different from *McNally v. Hill* where the granting of the writ would still leave petitioner in custody unless the parole board decided to release him on parole.

Where the court of appeals fell into serious error is in its interpretation of *Ex parte Hull,* 312 U.S. 546 (1941). That case, in a brief discussion, holds habeas corpus available to a petitioner confined under concurrent sentences who attacks only the second of two convictions where parole was revoked on the first conviction and he was ordered to serve out his first sentence "only because of the second conviction" (312 U.S. at 550). The use of the word "only" in *Hull* led the court of appeals to conclude in this case that the district courts do not have habeas corpus jurisdiction over state prisoners under concurrent sentences except

---

[9]This conditional release from custody certainly is within the jurisdiction of the federal district courts since the same conditional release obtained in the landmark case of *Fay v. Noia,* 372 U.S. 391 (1963).

"where probation or parole under a prior conviction was revoked *solely* because of the entry of a subsequent conviction." (Appendix II, p. 23, *infra*, emphasis added.) This interpretation of *Ex parte Hull* is unwarranted, in conflict with *McNally v. Hill* and *Fay v. Noia*, and, if allowed to stand, could seriously weaken what this Court has recently called "the power and the duty"[10] of federal courts to provide an effective remedy for the victims of unredressed unconstitutional state action.

In construing *Ex parte Hull* the Ninth Circuit by the use of the word "solely" now requires habeas corpus applicants under concurrent sentences to prove that a judge who made a decision revoking probation on a valid conviction acted on no stimulus or information other than the fact of a second conviction which has proved to be illegal. *Ex parte Hull* creates no such condition precedent to federal habeas corpus jurisdiction in concurrent sentence cases. All that the case stands for is the holding that under its facts the *McNally v. Hill* rule is satisfied, as it is in the instant case.

If the court of appeals decision is not reviewed by this Court it will mean that where an unconstitutional conviction was a substantial factor in the revocation of probation on an earlier conviction, the jail sentence will still stand if the prisoner does not get inside the thought processes of the revoking judge and prove

---

[10] *Fay v. Noia*, 372 U.S. 391, 441.

that it was the *sole* factor. This is not only a difficult burden, but gives force to an unconstitutional conviction which is by definition void. Petitioner submits that the only test consistent with guarantees of due process is one denying federal habeas jurisdiction only where probation would have been revoked even without the unconstitutional conviction.[11] Were the rule as the court of appeals would have it, then state prisoners would be immunized from federal relief where their imprisonment was caused by unconstitutional state action so long as the unconstitutional action were not the sole cause.[12]

---

2. There has been rapid change in the administration of criminal justice in recent years. We have enforced the Fourth Amendment by a universal prohibition of the use of illegally obtained evidence; we have enforced the Sixth Amendment by recognizing the right of the poor as well as the rich to have counsel and by recognizing a universal right to confront and cross-examine one's accusers; we have enforced the

---

[11]The excerpt from the state court proceedings *supra*, shows beyond question that the illegal conviction was a prominent reason for revocation of petitioner's probation.

[12]Also relevant is the fact that the unconstitutional second conviction, immunized from federal review under the Ninth Circuit rule, will cause the prisoner to be a multiple offender and reduce his chance for parole on the first sentence under applicable criteria of the California Adult Authority. See California Department of Corrections, *Biennial Report 1957-58*, p. 40; *California Adult Authority, Principles, Policies and Program* (5th Ed., 1952), pp. 8-9. We believe most jurisdictions treat multiple offenders more harshly than first offenders.

Fifth Amendment by prohibiting adverse comment on the failure of an accused to take the stand and by prohibiting implied coercion as well as direct coercion against those in police custody. These and other provisions of the Bill of Rights subsumed in the Fourteenth Amendment's due process clause are the fundamental tools for the shaping of justice. These tools do not attain justice by their existence but by their use. Not all of them need be used in every case, but this Court has required that there be a consciousness of their existence and capabilities before a relinquishment is effective. Whether counsel can relinquish these fundamental guarantees without his client's consent or understanding and in what circumstances are the important questions raised here.

First, there is no doubt that petitioner was deprived of valuable rights guaranteed to a defendant in a criminal case by the Sixth Amendment as incorporated to apply to state criminal proceedings by the Fourteenth Amendment. Neither petitioner nor his counsel either confronted or cross-examined any of the evidence against him at his trial. The district court held that he had a constitutional right to do so even before *Pointer v. Texas,* ..... U.S. ....., 13 L.Ed. 2d 923 (1965), and the court of appeals recognized that *Pointer* cinched the point. Second, petitioner was deprived of something even more fundamental than a right *in* a trial; he was deprived of the right *to* a trial. As we show below, the way in which the case was presented to the trial judge was in effect an admission of guilt even though petitioner never with-

drew his plea of "not guilty" and did nothing to prejudice his right to stand on his plea.

The Los Angeles County Public Defender's Office[13] assigned at least four separate attorneys to represent petitioner at various stages of the proceedings. The stipulation procedure adopted by the last of these counsel certainly saved time because it did away with an otherwise necessary trial. But the price for this dispatch is that petitioner, who was still "looking for a trial," finds his basic rights surrendered without his consent and, as found by this district court, over what would have been his objection had he been able to understand what his counsel was doing to him.

There is no doubt on this record that petitioner wanted a trial and did not get it. He did not want a jury to try his case and, in an enlightening display of concern for his rights, he was allowed to make a personal waiver only after the trial judge ascertained he knew what he was waiving (footnote 1 to Appendix I, *infra*). Every other right which is part of the bundle of rights known as a "trial" was taken from petitioner against his will. The district court found

---

[13] *Brubaker v. Dickson*, 310 F.2d 30 (9th Cir. 1962) is an ineffective counsel case where the court held (at footnote 3) that the public defender's actions are "state action" within the Fourteenth Amendment. The court found (at footnote 46): "The defense actually tendered was so insubstantial in relation to those not offered as to cast doubt upon the hypothesis that trial counsel made a deliberate, informed choice." In *Brubaker* the defendant personally consented to many of the waivers of his counsel. In our case we raise, but do not stress, denial of the Sixth Amendment right to effective assistance of counsel, because the waiver of trial by counsel without consent of his client is an even more fundamental defect.

and the court of appeals assumed[14] that the procedure whereby counsel submitted petitioner's case on the transcript without confrontation or cross-examination, without ascertaining whether petitioner wished to testify, and without any argument or attempt to support petitioner's plea of "not guilty," was done without the consent or understanding of petitioner. The court of appeals nevertheless found no constitutional violation by holding these were decisions of "trial strategy or tactics" which counsel had the power to make without the consent or understanding of his client.

There are fine lines to be drawn between "tactical" decisions of counsel and "fundamental" decisions. There is no doubt that counsel could not function if his every decision had to be explained to and consented in by his client. On the other hand, there should be no qualification to the statement that counsel, no matter how retained, has no power to plead his client guilty to a crime without express authority. The district court found the procedure used in this case to be a "slow plea of guilty" (Appendix I, *infra*, p. 6). As the court of appeals conceded and as the public defender admitted, counsel's trial strategy was to concentrate on the penalty phase and not seriously

---

[14]See footnote 9, Appendix II, *infra*. The further comments of the Court of Appeals in that footnote that if it had been the trier of fact it would have accepted the testimony of petitioner's appointed attorney are irrelevant in view of the District Court's findings to the contrary. Furthermore, the appointed attorney, even if credited, did not explain to petitioner that the right to confront and cross-examine witnesses would be waived. See R.T. 25.

contest the issue of guilt, the facts of which were "unavoidable" (R.T. 19). Consistent with this decision, counsel made no opening argument, made no closing argument, called no witnesses, failed to ascertain whether petitioner himself wanted to be a witness, and gave up the right to confront and cross-examine prosecution testimony.[15] The difference between these facts and a plea of guilty is so insignificant that it may be ignored. Cf. *Poe v. United States,* 233 F.Supp. 173, 177 (D.D.C. 1964). The court of appeals set a dangerous precedent in characterizing counsel's unilateral action countermanding petitioner's plea of "not guilty" as a mere tactical decision. If unauthorized waiver by a state-appointed attorney is sufficient to satisfy a "fundamental essential" to a fair trial, then *Gideon v. Wainwright,* 372 U.S. 395, could be a hindrance to indigent defendants rather than an aid.

The court of appeals relied upon *Henry v. Mississippi,* ..... U.S. ....., 13 L.Ed. 2d 408, to save its holding from fatal conflict with *Fay v. Noia,* 372 U.S. 391.

---

[15]It is not correct to say that there was no defense which petitioner could have raised to the charge. There is a possibility of reasonable doubt in almost every human occurrence and especially as to what happened in a husband-wife quarrel. Petitioner's drunkenness, which medical reports show has caused organic brain damage (see Appendix V), provided a good basis for a defense of temporary insanity or accidental infliction of the injury

The failure to confront and cross-examine is not cured by the fact that another deputy public defender cross-examined the wife at the preliminary examination. Because it is expected that there will be another opportunity to cross-examine at the trial, and because it is better strategy to reserve impeaching cross-examination for the trial, this examination is not thorough. See Continuing Education of the Bar, "California Criminal Law Practice" (1965), p. 241. The Court of Appeals decision gave no weight to this cross-examination.

In *Fay* this Court spoke of the waiver of fundamental constitutional rights as a personal decision of a defendant in a criminal case. The Court's language was clear:

> At all events we wish it clearly understood that the standard here put forth [for waiver of a constitutional right] depends on the considered choice of the petitioner. [372 U.S. at 439]

What the court of appeals failed to accept is that *Henry v. Mississippi* does not qualify or retreat from this language, but is perfectly compatible with it. In *Henry* trial counsel decided (at least so the Court assumed pending a hearing on remand) not to object to the introduction of evidence obtained illegally because he thought a better defense for his client was to allow the testimony and then impeach the witness on this very testimony. This was a true decision of trial strategy because it was meant to aid the defendant in raising a reasonable doubt as to guilt. It would be unreasonable to insist upon a constitutional right which hindered an accused in his defense, and this is why the doctrine of waiver exists.

But in our case it was clearly to the disadvantage of the accused on the issue of guilt to waive the right to have the prosecution prove its case by live evidence subject to cross-examination. The waiver of this right could not have aided petitioner in creating a reasonable doubt as to his guilt, and, in practical effect, was an admission of "no contest." Whether or not putting the prosecution to this test was bad strategy for sentencing is irrelevant since it was the

right of petitioner, not counsel, to plead "not guilty" and to have a trial. Counsel simply was not entitled to "act in petitioner's best interests" by waiving trial and concentrating on the penalty. The court of appeals erred in citing *Henry* for a contrary holding. Counsel has a good deal of responsibility in criminal cases but ordinarily he doesn't serve the prison sentence.

The interplay of *Fay* and *Henry* is misinterpreted by the court of appeals on another basis. *Henry* involved a decision by counsel in the midst of a hotly contested trial. If its holding is to be carried over to pre-trial decisions where a client can be consulted and time taken to explain the matter to him, then it should be conceded that once counsel is appointed[16] it is he who makes all the decisions in the case. This is not compatible with the early holding in *Patton v. United States,* that waiver requires an "express and intelligent consent of the defendant" (281 U.S. 276, 312) or with the language of *Johnson v. Zerbst,* 302 U.S. 458, 464, that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights," or with this Court's holding in *Carnley v. Cochran,* 369 U.S. 506, 515-517, that mere silence on the part of an accused cannot be taken as a waiver of constitutional rights. We do not think that this Court meant *Henry* to qualify any of these cases, or

[16]A defendant who retains counsel is in a different position from one who has counsel appointed. Retained counsel can be fired and can be given orders. An indigent must get along with his appointed counsel or have no counsel. He cannot insist that his appointed counsel visit him or take any specific steps in his defense unless, perhaps, he can obtain the consideration of a sympathetic judge.

to qualify the careful language of *Fay v. Noia,* but evidently the notion needs correcting.[17].

CONCLUSION

This case contains two issues of great importance. Each is significant, and their combined weight must surely draw the attention of this Court. Unfortunately, if the decision of the court of appeals stands we may lose sight of the simple truth expressed in *Johnson v. Zerbst,* 334 U.S. 266, 291: "The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned."

Dated, August 20, 1965.

Respectfully submitted,

MARSHALL W. KRAUSE,
Staff Counsel,
American Civil Liberties Union
of Northern California,
LAWRENCE SPEISER,
Attorneys for Petitioner.

(Appendices Follow)

---

[17]In other recent cases the Ninth Circuit has held *Henry* modifies the language of *Fay v. Noia:* See *Nelson v. California,* 346 F.2d 73 (9th Cir. 1965); *Rhay v. Browder,* 342 F.2d 345 (9th Cir. 1965).

Appendix I

Filed July 18, 1964,
James P. Welsh, Clerk.

In the United States District Court
For the Northern District of California
Southern Division

No. 41,890

Frederick Gray,
Petitioner,
vs.
Lawrence E. Wilson, Warden, San Quentin Prison, et al.,
Respondents.

ORDER GRANTING PETITION FOR A WRIT OF HABEAS CORPUS

Zirpoli, District Judge.

Frederick Gray, a state prisoner confined in San Quentin Prison, California, petitions this Court for a writ of habeas corpus on the ground that his conviction is in violation of the federal constitution. Petitioner was convicted by the Superior Court of Los Angeles County of violating Section 245 of the Penal Code of California (assault with a deadly weapon). As a result of his conviction, the Superior Court re-

voked his probation on a prior conviction of a similar offense. Since probation on the prior conviction was revoked because of the recent conviction, his confinement for both convictions is invalid if the recent conviction is invalid.

Petitioner pleaded not guilty, and when the case came on for trial he waived his right to a jury trial. The waiver was taken by the trial court after the prosecutor thoroughly questioned petitioner, so that the record was clear that petitioner understood that he had a right to a jury trial and that he was making an intelligent and understanding waiver of that right.[1]

---

[1] "The Court: All right. People versus Frederick Gray, 256751. The record may reflect that defendant is present with his counsel, counsel for the People also present.

Mr. Kilbride: Your Honor, my client wishes to waive or give up his right of trial by jury and have his case decided by this Court without a jury, and it is our wish that the matter be decided on the evidence taken at the preliminary hearing.

The Court: All right. Will you take the waiver of jury trial.

Mr. Crossman: Yes, your Honor. Frederick Gray, is that your true name?

(Defendant nods in the affirmative.)

Mr. Crossman: You will have to answer up so the reporter can hear you.

The Defendant: Yes.

Mr. Crossman: You spell your last name G-r-a-y.

The Defendant: Yes.

Mr. Crossman: Mr. Gray, do you understand that you are entitled to have your case tried by a jury composed of twelve people or you can give up that right and have the Judge sitting without a jury determine your case; do you understand that?

The Defendant: Yes.

Mr. Crossman: And your attorney, Mr. Kilbride, has represented to the Court that you wish to give up your right to a jury trial and have the Judge decide your case. Is that what you want to do?

The Defendant: Yes.

Mr. Crossman: You are doing that freely and voluntarily, Mr. Gray?

The Defendant: Yes.

Immediately after the waiver of the jury trial was taken, the prosecutor offered to stipulate that the matter be submitted on the transcript taken at the preliminary hearing. Petitioner's counsel, Mr. Kilbride, a deputy public defender, accepted the stipulation, waived argument, and submitted the matter. The Court found petitioner guilty of a violation of Section 245 of the Penal Code. The record does not show any assent by petitioner to the submission on the transcript without cross-examination or confrontation of the witness; however, the record also fails to show any objection by petitioner to this procedure.

Since the commitment to state prison, petitioner has filed several papers with this Court seeking relief by way of habeas corpus. He alleged several grounds for relief in his various petitions, but this Court has ruled that the only possible basis for relief is the following allegation with regard to the procedure at petitioner's trial:

> "On or about May 7, 1962 I was taken to trial in Superior Court 117. I was placed in a room along with other prison to waite trial. There was a case going on of one of the prison a continue from the day befor. So he was called in then later I was called in for trial. Mr. Kilbridge said he was my councal, and came to me and said Mr.

Mr. Crossman: All right. Do you at this time give up your right to a jury trial?
The Defendant: Yes.
Mr. Kilbride: Counsel joins in the waiver.
Mr. Crossman: People join in the waiver.
The Court: The Court will accept the waiver of jury trial."
(Reporter's Transcript pp. 1 and 2, proceeding in Superior Court May 10, 1962.)

Gray you is going to the peneatery. He was not my councal in Municiple Court, and had never talk to me about this case. The case went as follow the judge read the peoples of the State of California v. Frederick Gray. Then Mr. Kilbridge stated your honorable it is our wishes that the matter be heard on the preliminary hearing testimony.

"Then the district Attorney ask me if I wanted a jury trial or court trial. I said I wanted a court trail. Then the district attorney ask me again who I wanted to deside this case and I said the judge I may say here I was still looking for a trial. Then something came up about this other case that was going on befor I came in and they called a recease on my case and sent me out. Later I was call back into the court room, and the judge said well this case have been submited on the prelemary hearing testimony, and do any one else have anything to say. The record do not show this but I attempted to get up to say something, and my councal said to me sat down you will be charged with attempt court, and then my councal said no. Then the Judge said I find the defendant guilty. My councal then ask for probation hearing, and a examination of me this was granted and set for 22 days later." (Page 2 of the petition filed November 6, 1963.)

The basic claim presented by the above allegation is that petitioner did not personally waive his right to cross-examination and confrontation of the prosecution witnesses.

At the outset it should be noted that counsel have not cited any case nor has the Court found a case

where a federal court has specifically ruled that the right to cross-examination and confrontation is embodied in the due process clause of the Fourteenth Amendment. However, the Supreme Court has held that procedural due process requires that a state bar association permit an applicant to cross-examine and confront the witnesses against him in an administrative hearing to determine his fitness for the practice of law. *Willner v. Committee on Character,* 373 U.S. 96. If a state must accord the right to cross-examination and confrontation in an administrative hearing, *a fortiori* it must accord such rights in a criminal trial. Moreover, the right to cross-examination and confrontation is essential to a fair trial if the rules of procedure are to have as one of their objects the ascertainment of the truth. *Wigmore on Evidence,* Vol. 5, p. 28, sec. 1367 (3rd ed.) The Court therefore holds that the right of the accused to cross-examine and confront prosecution witnesses in a state criminal trial is guaranteed by the due process clause of the Fourteenth Amendment.

The accused may, however, waive his right to cross-examination and confrontation. *Diaz v. United States,* 223 U.S. 442. Normally, waiver is made by counsel as to particular witnesses, since as every trial lawyer knows, it is just as important to know when not to cross-examine as it is to know how to cross-examine. In such matters the accused must accede to his lawyer's judgment. As a practical matter, a reviewing court cannot find a denial of the constitutional right to cross-examination merely on the basis of an error

in trial tactics unless the error is so gross as to constitute a denial of adequate and effective assistance of counsel. *Brubaker v. Dickson,* 310 F.2d 30 (9th Cir. 1962). But there is a vast difference between questions of trial tactics and the complete submission of the issue of guilt or innocence on the cold record of a transcript. Practically speaking, such submissions are often nothing more than a "slow plea of guilty". The waiver of cross-examination and confrontation by submission on a preliminary transcript must be made by the accused rather than his attorney. Anything to the contrary in *Cruzado v. People of Puerto Rico,* 210 F.2d 789, suggesting a different conclusion is not controlling here in light of *Fay v. Noia,* 372 U.S. 391 (see *infra*).

The Supreme Court has held that a state court's finding of waiver does not bar independent determination of the question of waiver by the federal courts in habeas corpus hearings because waiver affecting federal rights is a federal question. *Fay v. Noia,* 372 U.S. 391, at 439. In order to determine whether there has been an effective waiver of a federal constitutional right, the Court in *Fay v. Noia, supra,* set forth the following guidelines:

> "The classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims

in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. Cf. Price v. Johnston, 334 U.S. 266, 291. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. Cf. Carnley v. Cochran, 369 U.S. 506, 513-517; Moore v. Michigan, 355 U.S. 155, 162-165. A choice made by counsel not participated in by the petitioner does not automatically bar relief."

Therefore, the issue before the Court boils down to whether the record in this matter shows an "intentional relinquishment or abandonment of a known right or privilege" by the defendant personally rather than by his counsel.

At the hearing on this matter before this Court, petitioner testified that the public defender, Mr. Kilbride, did not mention anything to him about submitting the matter on the transcript. The pertinent portions of petitioner's testimony are as follows:

"Mr. Rainsford: Calling your attention to the morning of May 10th, 1962, were you represented by the Public Defender of Los Angeles?

Mr. Gray: Yes, I was.

Q. Do you know his name?

A. Mr. Kilroy, I think it was.

Q. At that time, when your case was called for trial, did you waive your right to a jury trial?

A. I did.

Q. Now, after your waiver had been taken, was your case submitted on the transcript of the preliminary hearing?

A. Yes, it was.

Q. Now, Mr. Gray, did you consent to this submission of your case on the basis of the preliminary transcript?

A. No, sir, I didn't at no time.

Q. Did the Public Defender, your attorney, your counsel, explain the consequences of such a submission on the transcript of the preliminary?

A. No, he didn't.

Q. Did Judge Peracca, who presided that day, explain to you the consequences of the submission of your case on a preliminary transcript?

A. No, he did not.

Q. Did the Public Defender talk to you that morning in Court?

A. He came over and said, 'You are going to the penitentiary,' and that is all he said."

(Tr. page 5, line 1 to page 6, line 4.)

"Mr. Rainsford: Mr. Gray, at any time that morning of the trial, did anyone, the Judge or the Public Defender or any Court attache, explain to you that by submitting your case on the transcript of the preliminary that you were waiving your right to confront the witnesses and your right to cross-examine the witnesses?

Mr. Gray: No, they did not.

Q. How much education do you have?

A. I finished high school.

Q. Where was that?
A. Marshall, Texas.
Q. What was your employment?
A. Janitor.
Mr. Rainsford: That is all.
The Court: All right, Mr. Granucci.
Mr. Granucci: Thank you."
(Tr. page 9, line 21 to page 10, line 11.)

"Mr. Granucci: Now, did you consult with Mr. Kilbride at any time before the trial, at any time before you came to Court on this case?
Mr. Gray: No. Mr. Kilbride was just appointed to me.
Q. So it is your testimony that you did not consult with him at all?
A. Not before.
Q. Did you consult with him at any time?
A. No.
The Court: That is the only thing he ever told you, that you were going to the penitentiary?
The Witness: That is the only thing.
The Court: That is the only conversation you ever had with him.
The Witness: Yes, sir. I had another Public Defender before him.
Mr. Granucci: Mr. Gray, I am going to remind you that you are under oath in answering this. Did you tell Mr. Kilbride that you thought you had a good defense to this case?
A. No, I did not.
Q. Did you tell Mr. Kilbride that you could not remember anything about the facts of this case?
A. No, I didn't tell him.

Q. Did Mr. Kilbride tell you that he thought that it was the most advisable thing to do under the circumstances, to submit it on the preliminary transcript?

A. No, he did not."

(Tr. page 12, line 17 to page 13, line 19.)

Mr. Kilbride testified as follows:

"Mr. Granucci: Did you consult with Mr. Gray at any time before making an appearance on his behalf in the Superior Court?

Mr. Kilbride: Yes, I did.

Q. How many times?

A. I believe—My best recollection is twice before the proceedings commenced in Court.

Q. Did you inform him of the nature of the charge and discuss possible defenses?

A. There was such a discussion, yes.

Q. Did you advise him that you felt that the most advisable course was to submit the matter on the preliminary transcript?

A. Yes.

Q. Did he object to such a course of action?

A. No, he did not object to that course of action.

Q. Did he indicate to you his agreement with that course of action?

A. He agreed with me that that might be done, and we did it."

(Tr. page 17, line 4 to line 23.)

"Mr. Rainsford: When were you appointed to represent the petitioner? Calling your attention to May 10th, when were you appointed, if you can recall?

Mr. Kilbride—I don't recall. I can tell you what the usual——

Q. Not the usual, Mr. Kilbride. Had you represented the petitioner for some period of time before he made that court appearance?

A. My best recollection is that I did see him some period of time before the date of trial, yes.

Q. You stated on your direct, I believe, that you had taken over from another Public—or did you not, sir?

A. I did not say that myself, no.

Q. Did you consult with the petitioner in the County Jail? Do you recall, sir?

A. My recollection is that I did. But that is my best recollection."

(Tr. page 22, line 23 to page 23, line 15.)

"Mr. Rainsford: Did you talk to the defendant on the morning of May 10th?

Mr. Kilbride: Yes.

Q. Where did you talk to him?

A. I talked to him, according to my best recollection, in the detention room outside the Court.

Q. What did you say to him?

A. I cannot recall what language I used.

Q. Did you explain to him the legal principles involved in a submission on the transcript?

A. I gave him what I considered to be an adequate explanation, yes, for his purposes.

Q. What is an adequate explanation for his purposes?

A. As I say, I can't recall specifically what I said, but my best recollection is that I informed him that if the matter were submitted to the judge on the testimony of the preliminary hear-

ing, what would happen would be that the trial judge would read the testimony of the people who had come and testified at the preliminary hearing, that he would consider their testimony, that both sides would have the right to call additional witnesses, but that I did not intend to call any additional witnesses myself.

Q. How much time did you spend on this conversation?

A. I don't recall."

(Tr. page 24, line 24 to page 25, line 25.)

"The Court: You had this conversation with him in the detention room. What did he say when you made this suggestion?

Mr. Kilbride: The defendant—I can't recall specifically what I said, but I can say that he indicated to me that I could proceed in that manner. What I am trying to say is that he wasn't happy about having to stand trial.

The Court: And he agreed to have his case disposed of in that fashion?

Mr. Kilbride: That is my best recollection, yes. I might say, though, Your Honor, I could observe, for your Honor's benefit, that he had been incarcerated perhaps two months at that time and that may have a bearing upon that. If he was given to drinking prior to that time, the question might be whether in two months he had completely recovered from drinking; you see, it might have some slight bearing on it."

(Tr. page 27, line 4 to line 21.)

Mr. Kilbride testified that during the course of a single year he handles approximately 140 felony trials

and represents approximately 300 defendants. The major problem in Mr. Kilbride's mind at the time of trial was to present a good case for probation rather than to seriously adjudicate the question of guilt or innocence. As Mr. Kilbride explains it:

"Mr. Granucci: Now, counsel has raised this question, and I would like to explore it. Did you file a motion under Section 1382 of the California Penal Code for an appointment of a psychiatrist?

A. No.

Q. You did not?

A. I filed it under 1871 CCP.

Q. What was the purpose of that?

A. My purpose was to explore the possibility of presenting the Judge who would sentence him with some theory upon which probation might be predicated.

Q. In other words, you felt that this might give the—you had had your client convicted of an offense for which probation was possible; is that correct?

A. Yes.

Q. And you felt that this was the most advisable to seek, to get probation, was to——

A. Yes. This is not an ordinary situation.

Q. What was extraordinary about it, Mr. Kilbride?

A. Well, the problem was that the defendant was presently on probation for a very similar offence. In fact, if my recollection serves me right, it was the same complaining witness as in the case which I represented. Therefore, the ordinary result which you would expect if you are experienced in these matters, or if you are not, that the typical judge would be inclined to send him to the

State Prison. My thought was that if it could be developed that there was a physical disorder which would be amenable to some type of medical treatment which would contribute to his misbehavior, if I could approach the judge with such a potential program where he could get medication under supervision, that this might possibly persuade the judge to consider or to grant him further probation.

You see, although these facts appeared to me to be unavoidable, at the same time it was also evident that Mr. Gray was basically a devoted family man who loved his wife, and he had many children by her, and for the most part behaved himself very well. I expected that would impress the Court, too. So that we were not dealing with a man who was fundamentally a person what you might call of evil disposition, but whose disposition was good most of the time. And if the Court felt that this man was fundamentally a law-abiding person who possibly might be subject to some special type of treatment, then I thought perhaps we might be able to keep him out of prison that way. At the time, and even today, that seems to me to be the only even potential way of avoiding present commitment."

(Tr. page 17, line 24 to page 19, line 22)

In weighing the above testimony, the Court cannot disregard the fact that petitioner, although a high school graduate, is a man of limited educational background, as seen from the above quotation of his pleadings. Nor can the Court disregard the fact that Mr. Kilbride is relating a conversation that took place two years ago at the time that Mr. Kilbride was han-

dling several hundred cases a year in a very busy office. Mr. Kilbride's major concern at the time was to try to convince the Court of the desirability of probation, rather than attempting to establish petitioner's innocence. Mr. Kilbride does not recall how long the conversation took place, how many times he talked with petitioner, or what, if anything, petitioner said in response to the suggestion to submit the case on the transcript. Mr. Kilbride's "best recollection" is that he explained that the procedure involved having the judge read the transcript. The fact that Mr. Kilbride used the phrase "best recollection" suggests that he does not remember the details of the conversation. Nowhere in the record does it appear that petitioner was made aware of the fact that he had the constitutional right to have the witnesses cross-examined, to confront them, and to have the trial judge observe their demeanor.

In light of the above factors, the Court could do no more than guess as to whether petitioner understood that he had a constitutional right to cross-examination and confrontation; that the probable consequences of such a procedure would be a finding of guilt; and that with these facts in mind he agreed to such a procedure. A waiver of a federal constitutional right is not to be lightly presumed. *Himmelfarb v. United States,* 175 F.2d 924. The most likely interpretation of the above record is that Mr. Kilbride suggested a procedure and the petitioner simply left the matter up to his attorney without fully understanding that he had a right to cross-examination and confrontation, and that the

probable consequence of this procedure would be a finding of guilt. Upon reviewing the entire record and observing the demeanor of the witnesses, the Court seriously doubts that the decision to submit this case on the transcript was the "considered choice of the petitioner". *Fay v. Noia, supra.* Certainly, the Court cannot find a waiver of a federal constitutional right where the most that the record will permit is speculation as to petitioner's understanding of his rights and the probable consequences of such a waiver.

The problem presented by this case raises an important problem in the administration of criminal justice and the role of the federal courts in post-conviction review of state proceedings by way of habeas corpus. A federal court has the duty to insure that state courts do not deprive defendants of federal constitutional rights. Certainly no federal judge relishes the thought of upsetting a state conviction where the evidence of guilt is as strong as it is in the present case. But it must be borne in mind that a great number of criminal defendants are persons of limited educational, cultural and intellectual backgrounds. Only those who are "con-wise" have more than a vague understanding of criminal procedure. A federal court cannot lightly assume or speculate that the average defendant fully understands his constitutional procedural rights.

The better procedure, although not the constitutionally required procedure, for all courts, whether state or federal, would be for the trial judge to fully examine the accused on the record to insure that he

is aware of his constitutional rights, that he is making an intelligent waiver thereof, and that he appreciates the possible consequences of such a waiver. Cf. *Johnson v. Zerbst*, 304 U.S. 458, at 465 (1937). Not only does such a procedure have the advantage of preventing a subsequent reversal of the conviction on post-conviction review, it has the more important advantage that the accused would be assured of having a clear understanding of the significance of any waiver he might make. As a result, both the interest of the state and the rights of the accused would be more fully protected. Without a clear waiver on the record, as was done in this case with regard to the waiver of a jury trial, the federal courts must continue to hold hearings and weigh conflicting and uncertain evidence, all of which entails the double risk of failing to adequately protect the rights of the accused or to unduly interfere with the administration of state criminal justice by overturning an otherwise valid conviction.

The Court is painfully aware of the fact that many state prisoners are serving sentences under convictions which were obtained by procedures similar to that adopted in this case. In light of the fact that the federal courts are already overburdened with habeas petitions from state prisons, the Court is not pleased with having to render a decision which may tend to "open the floodgates", but such a consideration has no place in a judge's decision as to whether a person is presently serving a prison sentence in violation of the constitution. The duty of the federal courts in

these times of change in the law of criminal procedure has been aptly stated by Judge Hastie in the recent case of *United States v. Myers,* 329 F.2d 856, 859:

> "In actuality, all criminal convictions, all appellate judgments reversing convictions and, most notably, all judgments sustaining collateral attacks on convictions impose legal consequences upon the basis of the court's present legal evaluation of past conduct. It is irrelevant that the judge's views of what constitutes a denial of due process may have changed since the occurrence of the events in suit, or that he or some other judge might have rendered a different decision had the same matter reached his court years earlier. The petitioner is entitled to the most competent and informed decision the judge can now make whether there was fundamental unfairness in his past conviction. Our system is not so unenlightened as to require that in attaching *present* consequences to 1931 occurrences, a judge must ignore all of the insight that men learned in the law and observant of human behavior have acquired concerning the essentials of tolerable criminal procedure during the past 30 years."

Before concluding, the Court wishes to note for the record that its findings are not in any way intended to cast aspersions upon Mr. Kilbride's integrity, truthfulness or professional abilities; nor does the Court wish to imply that he was not acting in the best interests of his client by concentrating on the sentencing problem rather than the question of guilt or innocence. In light of petitioner's own tacit admissions of guilt, his lack of protestation of innocence, and the

overwhelming evidence of guilt in the record before the Court, Mr. Kilbride had little choice but to concentrate on the sentencing problem. Finally, the Court expresses its thanks to Mr. Malcolm Rainsford of the San Francisco bar for his excellent representation of petitioner as court appointed counsel without compensation.

The petitioner is remanded to the Superior Court of the State of California in and for the County of Los Angeles for further proceedings not inconsistent with this opinion, and the respondent, Warden of the California State Prison at San Quentin, California is directed to deliver petitioner into the custody of the Sheriff of the County of Los Angeles of the State of California for the purposes of this remand. The foregoing order and directive of this Court to the respondent is stayed for a period of ten (10) days.

Dated, June 17, 1964.

/s/ Alfonso J. Zirpoli
United States District Judge

Appendix II

United States Court of Appeals
for the Ninth Circuit

Lawrence E. Wilson, Warden of San Quentin Prison, Appellant, vs. Frederick Gray, Appellee.	No. 19,380

[April 21, 1965]

Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: HAMLEY, HAMLIN and DUNIWAY, Circuit Judges

HAMLIN, Circuit Judge

Appellee, Frederick Gray, is an inmate at San Quentin Prison, California. On April 3, 1962, the appellee was charged by information in the Superior Court of the State of California in and for the County of Los Angeles with assault with a deadly weapon, a violation of section 245 of the California Penal Code. On April 12, 1962, the appellee, represented by his attorney, a deputy public defender of Los Angeles County, en-

tered a plea of not guilty. When the case came on for trial in the Superior Court of Los Angeles County, appellee, represented by his attorney, personally waived his right to a trial by jury. In appellee's presence and without any objection on the part of appellee, his attorney stipulated that the matter be heard on the transcript of the preliminary hearing, each side retaining the right to produce additional evidence at the trial. However, at the trial neither side produced any further evidence. Appellee was found guilty of assault by force likely to produce great bodily harm, a lesser included offense of the crime charged in the information. On June 1, 1962, appellee's motion for probation was denied, and he was sentenced to state prison for the term prescribed by law. Throughout these proceedings, appellee was on probation for a similar offense of which he had been convicted on June 30, 1961. Immediately after the sentencing proceedings for the more recent offense, a hearing was held on the revocation of probation as to the prior offense. The Superior Court found appellee in violation of probation and sentenced him to imprisonment in the state prison for a term to run concurrently with that previously imposed for the more recent offense.

On November 6, 1963, appellee filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 *et seq.* in the United States District Court for the Northern District of California, Southern Division. In substance, appellee alleged in his petition for the writ of habeas corpus that he was convicted in violation of his constitutional rights in that the sub-

mission of the case on the preliminary transcript by his attorney without his express personal waiver constituted a denial of his right to cross examine and confront prosecution witnesses. On June 17, 1964, after a full evidentiary hearing, the district court granted the writ of habeas corpus, remanding the appellee to the Superior Court for the County of Los Angeles.[1] Notice of appeal was filed and a certificate of probable cause issued out of this court on June 26, 1964. This court has jurisdiction to hear the instant appeal under 28 U.S.C. § 2243.

The sole issue on appeal is whether the district court erred in granting appellee's petition for a writ of habeas corpus. A threshold inquiry, however, is whether the district court has jurisdiction to grant the writ of habeas corpus. Appellant contends that the district court did not have jurisdiction because the appellee was then serving a sentence under a separate valid judgment and commitment based upon the revocation of probation for his previous offense. It is well settled that a federal court may not issue a writ of habeas corpus to set aside an invalid judgment and commitment where the petitioner is also held in custody under a lawful judgment and commitment. *McNally v. Hill,* 293 U.S. 131 (1934); *Lee v. Swope,* 225 F.2d 674 (1955) and cases cited therein. The rationale underlying this rule was aptly stated by the Supreme Court: "There is no warrant in . . . the writ for its use to invoke judicial determination of questions which

[1] *Gray v. Wilson,* 230 F.Supp. 860 (N.D. Cal. 1964).

could not affect the lawfulness of the custody and detention." *McNally v. Hill, supra* at 137. In short, the writ of habeas corpus is only available in situations where discharge from custody will result from the granting of relief. *Id.* Consistent with this proposition, a limited exception to the rule announced in *McNally v. Hill* has been carved out where probation or parole under a prior conviction was revoked solely because of the entry of a subsequent conviction. *Ex parte Hull,* 312 U.S. 546 (1941). In such cases a state prisoner may be discharged on a writ of habeas corpus challenging the second conviction without attacking the first conviction. *Id.* The district court found that the Superior Court revoked appellee's probation as a result of his conviction for the second offense.[2] We do not agree. The record of what transpired in the state court is set out below.[3] This record shows that not only the con-

---

[2]*Gray v. Wilson,* 230 F.Supp. at 861.

[3]The matter of probation for the second offense (256751) came on for hearing at the same time as the hearing for revocation of probation on the first offense (241385).

"LOS ANGELES, CALIFORNIA, FRIDAY, JUNE 1, 1962. 10:30 a.m.

"THE COURT: People versus Frederick Gray, 256751.

"MR. KILBRIDE: Mr. Gray.

"THE COURT: And 241385. 241385 is here on violation of probation hearing.

"The record may reflect the defendant is present with his counsel. Have you read the Probation Officer's report?

"MR. KILBRIDE: Yes, I have, your Honor.

* * *

"THE COURT: All right. In case number 256751 is arraignment for judgment and sentence waived?

"MR. KILBRIDE: Yes.

"THE COURT: Is there any legal cause to show why the judgment of this Court should not now be pronounced and sentence imposed?

"MR. KILBRIDE: There is no legal cause. My client wishes me to address the Court, though.

viction of appellee was taken into consideration, but also taken into consideration were all of the other relevant facts as shown by the probation officer's report, the eight-page psychiatrist's report, the letter of

---

"THE COURT: You may do so.

"MR. KILBRIDE: Your Honor, the defendant has asked me on more than one occasion to express to the Court that, number one, he is most remorseful for this behavior. He admits that it probably occurred although he specifically wasn't even able to remember it and is aware that the entire problem as far as maintaining good behavior centers around alcohol and as your Honor may be aware the family says the same thing, that when he is sober he is fine and when he drinks he seems to be like another person, and he has asked me to tell the Court this latest escapade has bore upon him more strongly than his previous difficulties. If given the opportunity, he is determined to stay dry and he believes that he can do it and he promises that he will join the Alcoholics Anonymous and attend church regularly and make every effort to stay off of drink.

• • •

"THE COURT: You apparently, Mr. Gray, get into these fracases with your wife and your actions are very violent and then you don't remember apparently according to your statement. I have read your letter. I have read everything about you and I have read the psychiatrist's report that I appointed, eight pages long.

"THE DEFENDANT: If I get out of this and join Alcoholics Anonymous, I know I can't drink now. I realize that.

"THE COURT: It appears that you need some help that you can't possibly get by yourself and this couldn't possibly be available by probation because you have already been on probation June 30, 1961, and in that other case the Court took cognizance, I read the whole file, took cognizance of what you said there, that you would behave. I don't think that you can do it by yourself actually. You were not supposed to drink yet here you are back here on a very serious case.

"I know your family would like to have you back. Your wife could have died and the doctor's report indicates that you are in need of considerable help. Couldn't possibly do it alone or even with the help of your family.

"Anything further?

"MR. KILBRIDE: Nothing further, your Honor.

"THE COURT: All right. The record may reflect that the Court has received, read and considered the Probation Officer's report. You have to be placed somewhere where that brain of yours is going to have all of the alcohol taken out of it and then I feel maybe that you will be able to rehabilitate yourself after that. Where I am going to send you they have Alcoholics Anony-

the appellee to the judge, the fact that appellee, contrary to the restrictions of his probation, had been drinking, that appellee had an alcoholic wet brain, and that he needed to be placed where he would not have

---

mous programs and it will be up to you at that time and that place to get on that program and help yourself.

"All right. The Court has read the report of Dr. Marcus Crahan filed with the Court on May 29, 1962, which he recommends be made a part of the file which ultimately will be forwarded to the Adult Authority.

"Probation is denied. The defendant is sentenced to imprisonment in the State Prison of the State of California for the term prescribed by law. In the execution and enforcement of this sentence the defendant is remanded to the custody of the Sheriff of Los Angeles County to be by him delivered into the custody of the Director of Corrections at the California Institution for Men at Chino, California.

"We will now take up the other case, 241385, which is a hearing on violation of probation. You have read the Probation Officer's report relative to that case?

"MR. KILBRIDE: Yes, your Honor.

"THE COURT: By reason of the commission by the defendant of the offense as to which he was convicted in case number 256751 and as to which he has just been sentenced to the State Prison, the Court finds the defendant in violation of probation in this case 241385 and revokes the order heretofore made granting the defendant probation. Is the defendant ready for arraignment for judgment and sentence?

"MR. KILBRIDE: Yes, your Honor.

"THE COURT: Is arraignment for judgment and sentence waived?

"MR. KILBRIDE: It is, your Honor.

"THE COURT: Is there any legal cause to show why the judgment of this Court should not now be pronounced and sentence imposed?

"MR. KILBRIDE: There is none, your Honor.

"THE COURT: Your remarks, Mr. Kilbride which were made in case number 256751 on behalf of the defendant and the Court's remarks relative to the Probation Officer's report and the report of Dr. Marcus Crahan heretofore referred to by the Court should stand at this point and be included.

"MR. KILBRIDE: Thank you, your Honor.

"THE COURT: The Court having read and considered the Probation Officer's report, also having read the report of Dr. Marcus Crahan heretofore appointed by the Court to make a psychiatric examination of the defendant, probation having been revoked, the defendant is now sentenced to imprisonment in the State Prison of the State of California for the term prescribed by

access to alcohol and where he would receive medical attention, and the other matters as shown in the record. Upon careful consideration of the relevant portions of the record in this case, we are of the opinion that the record clearly indicates that the Superior Court's decision revoking appellee's probation was predicated upon the appellee's conduct, only a portion of which constituted the offense of which he was charged and for which he was convicted, and not solely by reason of his conviction for that offense. Therefore, we hold that the district court's finding in this regard was "clearly erroneous." Rule 52(a), Federal Rules of Civil Procedure; *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948).

Since, under the circumstances of this case, the commitment for the prior offense is valid and the two sentences appellee is presently serving are concurrent, discharge will not follow the granting of relief from the commitment for the second offense. We hold, therefore, that the district court did not have jurisdiction to grant appellee's writ of habeas corpus. *Mc-*

---

law. The sentence in this case is to run concurrently with the sentence just imposed in case number 256751.

* * *

"And I trust, Mr. Gray, that you will do everything to help yourself there. There will be facilities that will be made available for you and you've got to get rid of this condition in your brain. According to the doctor you have an alcoholic wet brain. We had an encephalogram run of you at considerable expense as part of the psychiatric examination. There isn't any question but that you need help and care. I believe you will get it where I have sent you. You may disagree with me but this is my own considered opinion. You are remanded to the custody of the Sheriff."

Nally v. Hill, 293 U.S. 131, 137 (1934); *Lee v. Swope*, 225 F.2d 674 (9th Cir. 1955) and cases cited therein.

On a separate and independent ground we also believe the decision of the district court should be reversed. The only claim asserted by the appellee in his petition for the writ of habeas corpus considered by the district court under the commitment for the second offense was that the appellee did not personally waive his right to cross examination and confrontation of the prosecution's witness. It was on the basis of this allegation that the district court granted the writ of habeas corpus. The district court held that the right of an accused to cross examine and confront prosecution witnesses in a state criminal trial was guaranteed by the due process clause of the Fourteenth Amendment; that the waiver of this right must be made by the accused personally rather than by his attorney; and that the appellee had not personally waived this right.[4] We agree that the right of an accused to cross examine and confront prosecution witnesses in a state criminal trial is an essential ingredient of a fair trial. As such it is necessarily a right embodied in the due process clause of the Fourteenth Amendment. *Pointer v. Texas*, ... U.S. ....., decided April 5, 1965; Cf. *Willner v. Committee on Character*, 373 U.S. 96 (1963);[5] see *Brubaker v. Dickson*, 310 F.2d 30 (9th

---

[4] *Gray v. Wilson*, 230 F.Supp. 862-67.

[5] In *Willner v. Committee on Character*, the Supreme Court held that due process requires that a state bar association permit an applicant to cross examine and confront the witnesses against him in an administrative hearing to determine his fitness for the practice of law. 373 U.S. 96 (1963).

Cir. 1962).[6] But we do not agree that in all cases the waiver of this right must be made by the accused personally rather than by his counsel. It has been consistently held that the accused may waive his right to cross examination and confrontation and that the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or strategy. *E.g., Diaz v. United States,* 223 U.S. 442 (1912); *Cruzado v. People of Puerto Rico,* 210 F.2d 789 (1st Cir. 1954); *Fukunaga v. Territory of Hawaii,* 33 F.2d 396 (9th Cir. 1929); *United States v. Meyers,* 226 F. Supp. 343 (E.D.Pa. 1964).[7] Here, in the presence of appellee and without any objection on his part, his counsel stipulated that the matter be heard on the

---

[6]In *Brubaker v. Dickson* we reiterated the applicable standard:

"'The requirements of the Fourteenth Amendment is for a fair trial'; the due process clause 'prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right.'" 310 F.2d at 37.

Compliance with this standard required that the appellee be accorded the right to confront and cross examine the prosecution's witnesses. *Cf., Willner v. Committee on Character, supra* at n. 5.

[7]That this procedure is proper was recognized by the district judge when he stated:

"The accused may, however, waive his right to cross examination and confrontation. *Diaz v. United States,* 223 U.S. 442. Normally, waiver is made by counsel as to particular witnesses, since as every trial lawyer knows, it is just as important to know when not to cross examine as it is to know how to cross examine. In such matters the accused must accede to his lawyer's judgment. As a practical matter a reviewing court can not find a denial of the constitutional right to cross examination merely on the basis of an error in trial tactics unless the error is so gross as to constitute a denial of effective and adequate assistance of counsel. *Brubaker v. Dickson,* 310 F.2d 30 (9th Cir.)." *Gray v. Wilson,* 230 F.Supp. at 862.

transcript of the preliminary hearing, each side retaining the right to produce additional evidence at the trial. The record clearly indicates that under the circumstances of the case as they existed at the time of trial, the decision of appellee's counsel to enter the stipulation was both wise and prudent, a decision deliberately made as a matter of trial tactics and strategy.[8] We hold that under the circumstances of

---

[8]The transcript of the preliminary examination consisted only of the testimony of one witness, the wife of the appellee who was the victim of appellee's assault with an ice pick. Her testimony, direct and cross, comprises only seven short pages. The direct examination was as follows:

BY MR. CABALLERO:

Q Mrs. Gray, what is your home address and telephone number?

A 234 East 54th Street and I don't have a telephone.

Q You are a housewife?

A Yes.

Q Were you living at that address on March 8, 1962?

A Yes.

Q That is here in the City and County of Los Angeles, is it?

A Yes.

Q Now, on that date at approximately 7:50 p.m. or around 7:30 at night were you at home?

A Yes.

Q Did you see the defendant, the defendant sitting at the counsel table here—is that your husband (indicating)?

A Yes.

Q Did he come over to the house about 10 minutes to 8:00 that night?

A Yes.

Q And what happened?

A He asked me did I get him a package of cigarettes and I told him no. I didn't have the money, I had to work with his money, and they paid us off with a check and I didn't have any money there.

Q What did he say or do then?

A We argued and then he stuck me.

Q What did he stick you with?

A An ice pick.

Q Where did he stick you with the ice pick?

this case the appellee's right to cross examine and confront prosecution witnesses was effectively waived

---

A In the arm here (indicating).
MR. CABALLERO: Indicating the right arm near the wrist, for the record.
THE COURT: The record may so show.
BY MR. CABALLERO:
Q Where else did you indicate?
A Here (indicating).
MR. CABALLERO: Indicating above the left wrist.
BY MR. CABALLERO:
Q Anywhere else?
A Here (indicating).
MR. CABALLERO: And in the stomach.
THE COURT: Let the record show both those locations.
BY MR. CABALLERO:
Q Were you taken to the hospital?
A Yes, I was.
Q In an ambulance?
A Yes.
Q And how long did you stay in the hospital?
A Three days.
MR. CABALLERO: You may cross examine."

The transcript of the testimony of this witness was far more innocuous than the appearance of that witness before the state judge could ever have been. There is no showing of intent, of malice, of how drunk the defendant was, of former conduct including drinking, of any former attack upon her, of the extent of the wounds inflicted on the victim, of any medical testimony in relation thereto, or of many other facts that a Superior Court judge would have insisted upon knowing if the trial was before him. It would seem that any trial lawyer would have been well pleased if the Superior Court judge would only have this transcript before him rather than the gory details given by witnesses in open court. This is a matter upon which a lawyer's judgment is far better than a defendant's.

Moreover, there can be no question of the competency of counsel in this case. Appellee's counsel was a member of the public defender's office in Los Angeles County. This court has had occasion in the past to comment on that office when we said in *Brubaker v. Dickson*, "The reputation of the office of the public defender of Los Angeles County and of trial counsel in this case negated any possibility that available defenses were deliberately withheld to win delay and to give accused two chances to prevail." 310 F.2d at 39. Indeed, in this case the district judge had occasion to make the following comment:

> "Before concluding, the court wishes to note for the record that its findings are not in any way intended to cast asper-

by his counsel.[9] Nor is this result inconsistent with *Fay v. Noia,* 372 U.S. 391 (1963). There, the Supreme Court stated the following guidelines for determining whether there has been an effective waiver of a federal constitutional right:

> "The classic definition of waiver enunciated in *Johnson v. Zerbst,* 304 U.S. 458, 464 . . . —'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the delib-

---

sions upon Mr. Kilbride's integrity, truthfulness or professional ability; nor does the court wish to imply that he was not acting in the best interests of his client by concentrating on the sentencing problem rather than the question of guilt or innocence. In light of petitioner's own tacit admissions of guilt, his lack of protestation of innocence, and the overwhelming evidence of guilt in the record before the court, Mr. Kilbride had little choice but to concentrate on the sentencing problem." *Gray v. Wilson,* 230 F.Supp. at 868.

[9] We are not basing our holding on the testimony that the appellee verbally consented to the submission of the case on the transcript. However, the record discloses that appellee's counsel, a member of the public defender's office for approximately ten years, testified that he had two conferences with appellee in prison prior to the date of trial and that in these conferences the appellee agreed with the procedure of submitting the case on the transcript of the preliminary examination. That these jail visits were made is corroborated by two written visitor's slips from the jail which were admitted in evidence showing that counsel had twice visited the appellee in jail prior to the date of trial.

As opposed to this evidence, the appellee denied that he had ever seen Mr. Kilbride prior to the date of trial and he testified that on the day of trial the only words spoken to him by Mr. Kilbride were, "You are going to the penitentiary." On the basis of this record it would seem to us that a finding that the appellee was not telling the truth in this regard would not be unreasonable.

> erate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. . . . [citing authority]. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. . . . [citing authority]. *A choice made by counsel not participated in by the petitioner does not automatically bar relief.*" *Id.* at 439 (Emphasis added).

Implicit in this statement is the notion that in the proper circumstances counsel for the accused may effectively waive certain rights of the accused during the course of his representation of the accused and as a matter of trial strategy or tactics. This proposition has consistently been affirmed and applied by this court. See, *e.g., Brubaker v. Dickson,* 310 F.2d 30, 37 (9th Cir. 1962); *Rhay v. Browder,* decided February 5, 1965 (9th Cir.) (Duniway, J.). Moreover, any doubts regarding the validity of this proposition were erased in the recent case of *Henry v. Mississippi,* decided January 18, 1965. There, the Supreme Court stated:

> "If either [tactical] reason motivated the action of petitioner's counsel, and their plans backfired, *counsel's deliberate choice of strategy* would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or

here. Although trial strategy adopted by counsel without prior consultation with an accused will not, *where the circumstances are exceptional,* preclude the accused from asserting constitutional claims, see *Whitus v. Balkcom,* 333 F.2d 496 (C. A. 5th Cir. 1964), we think that the deliberate bypassing by counsel of the contemporaneous objection rule as a part of trial strategy would have that effect in this case." *Id.* at p. 8-9. (Emphasis added).

Clearly, the instant case is not one "where the circumstances are exceptional" so as to preclude the finding of an effective waiver of the right in question of the accused by his counsel. *Id.;* compare *Whitus v. Balkcom,* 333 F.2d 496 (5th Cir. 1964); *Fay v. Noia,* 372 U.S. 391 (1963).

The wisdom and the propriety of permitting counsel in the proper circumstances to effectively waive certain rights of the accused as a matter of trial strategy or tactics is suggested by sound reasoning as well as authority. The sound reasoning underlying this proposition was succinctly set forth in the recent case of *Rhay v. Browder,* decided February 5, 1965 (9th Cir. (Duniway, J.):

> "For many years, the Supreme Court has been steadily enlarging the scope of the guarantee of the right to counsel contained in the Sixth Amendment, and always on the grounds so eloquently stated in *Powell v. Alabama,* 1932, 287 U.S. 45, 68-69:
>
> 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right

to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense.'

"See also *Gideon v. Wainwright,* 1963, 372 U.S. 335, 344-45; *Douglas v. California,* 1963, 372 U.S. 353. We are in hearty agreement with these views. And we think that it inevitably flows from them that, when a defendant has counsel . . . it is counsel's decision on a question such as is here involved that must control. Counsel is the manager of the lawsuit; this is the essence of the adversary system of which we are so proud. In the nature of

> things he must be, because he knows how to do the job and the defendant does not. That is why counsel must be there." *Id.*

That the concept of due process accords the accused in our society numerous and valuable rights needs no documentation. Variations in the factual context giving rise to the issue of waiver of any one right of the accused are infinite. Whether the waiver of a given right under the circumstances must be made by the accused personally or may be made by his counsel as a matter of trial strategy or tactics is necessarily an issue that must be resolved by the common law decision-making process, the process of inclusion and exclusion. The language of this court in *Brubaker v. Dickson,* 310 F.2d 30, 37 (9th Cir. 1962), appropriately described the proper judicial rule:

> "Determining whether the demands of due process were met in such a case as this requires a decision as to whether 'upon the whole course of the proceedings,' and in all the attending circumstances, there was a denial of fundamental fairness; it is inevitably a question of judgment and degree."

We believe the record in this case abundantly shows there was no denial of fundamental fairness to appellee and that under the facts of this case the stipulation by counsel made in the presence of appellee and without objection by him constituted no failure of due process. The order of the district court granting the writ of habeas corpus is reversed and the district court

is directed to dismiss the proceeding and remand appellee to the custody of appellant.

Reversed and remanded.

HAMLEY, J. (Concurring):

I concur in the opinion insofar as it holds that the district court did not have jurisdiction to entertain the application for a writ of habeas corpus because the applicant was in custody under another valid and unchallenged judgment and commitment. I express no view as to the second and independent ground stated in the opinion for reversing the district court order.

Appendix III

United States Court of Appeals
for the Ninth Circuit

No. 19,380

Lawrence E. Wilson, Warden of San Quentin Prison,
Appellant,

vs.

Frederick Gray,
Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, and that this Cause be and hereby is remanded to the said District Court.

Filed and entered April 21, 1965

Appendix IV

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday, May 26, 1965

Before: HAMLEY, HAMLIN and DUNIWAY, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellee filed May 21, 1965, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

Appendix V

EXCERPTS FROM EXHIBITS TO "MOTION IN OPPOSITION TO APPLICATION FOR STAY OF MANDATE" FILED BY RESPONDENT AND PART OF THE CERTIFIED RECORD IN THIS COURT.

CUMULATIVE CASE SUMMARY

State of California
Department of Corrections

Commitment Name: GRAY, Frederick Birthplace: Texas
Age: 41 (1962) B: 1-5-21 Race: Negro

Received:	6-12-62	Offense:	Aslt w/Force (Prob Rev) & Aslt w/Force, CC
County:	Los Angeles		
Case #:	241385 & 256751	Sec. & Code:	245 PC
Judge:	A P Peracca		
Dist. Atty:	W B McKesson	Sentence:	6 mo-10, 2 cts CC
Def. Atty:	PD		
Plea:	CC	Min. Term:	6 mos
Partner:	None	Min. Eli. PD:	6 mos 12-12-62
		Prison Status:	1st termer
		Weapon:	See below
		Prior Felony:	None

Knife, (241385) & Ice pick (256751) (Not proved)

The within instrument is a correct copy of the original on file in this office.
Attest:
L. E. Wilson, Warden
California State Prison
At San Quentin
(S E A L)
By.....
Records Officer
(Affix Seal) 130 6-29-62 mh-S

• • •

PSYCHOLOGICAL REPORT

Tests Administered:
AGCT, COAS, MPFB, DAT, DAP, WAY, California Reading, Shipley, Math. Inter., Kuder, Minn. Clerical, Sentence Completion, Diagnostic Interview.

Intellectual Classification:
Dull-normal

Personality Factors:

This inmate is a 41-year-old Negro married male currently imprisoned for the crime of assault with force, probation revoked and assault with force, all concurrent. It appears that on both of these occasions he attacked his wife.

The test productions of this inmate indicated that he is of dull-normal intelligence with an overall I.Q. of 88. His intellectual functioning appears markedly impaired, particularly in the areas of abstract reasoning and inferential thinking. On interview, his thinking appeared concrete. A psychiatric examination conducted at the Los Angeles County Jail indicates that this inmate is a chronic alcoholic with resultant mental deterioration. It was noted that this inmate can be dangerous as exhibited by his past aggressive behavior.

The outstanding finding in the test material and on interview is this inmate's marked inadequate orientation. He shows marked inadaptability, ineptness, and poor judgment. He reacts with excitability when confronted by minor stress, especially under the influence of alcohol. Under these circumstances, his aggression becomes uncontrolled and his present crimes ensue.

DIAGNOSTIC IMPRESSION:

Inadequate personality with chronic alcoholism and possible organic brain damage.

RECOMMENDATIONS:

San Quentin appears recommended with referral to the psychiatric unit for observation. In view of a past psychiatric report indicating organic brain damage, further neurological examinations are recommended.

In view of his dull-normal intelligence, his inadequate orientation, and his lack of concern about himself, counseling and/or psychotherapy would be of limited benefit to this inmate.

6-26-62 E. Rivlin, Clinical Psychologist III

GRAY A-72939 RGC-CHINO 6-26-62 pk 6

• • •

CASE SUMMARY

Time in state before offense: 6 years Age 1st arrest: 32 ESCAPES: None
Type of inst. 1st commitment: County Jail Age 1st commitment: 41
Reason for 1st commitment: Gambling

EDUCATION. Age left school: 19 Claimed grade: 11
INTELLIGENCE LEVEL: Dull Normal Measured grade: 6.7 Verif: None

PARENTS:	AGE	OCCUPATION	ADDRESS
Fa: Matthew Gray		Farmer	Deceased, age 59.
Mo: Pearl (Dardon)	60	Dayworker	165 E. 57th St., L.A.

SIBLINGS	AGE	OCCUPATION	ADDRESS
1. Subject	41(K)	Stable—living with wife	
2. Malessia Dean	55	Factory wkr. Vernon & Compton, L.A.	
3. Robert Gray	53	Glass factory 225 E. 64th St., L.A.	
4. Herbert Gray	39	U.S. Rubber Co. 336 E. 68th St., L.A.	
5. Ruth Houston	37	Dress shop owner 506 E. 59th Pl., L.A.	
6.			

FAMILY ARREST HISTORY: None

RESIDENTIAL PATTERN:
Rural south as a child.

JUVENILE DELINQUENCY: (A) (L) (G) None

MARRIAGES	AGE	PLACE	DATE	OUTCOME
1. Henrietta Hudson	21	Marshal, Tex.	1940	Divorced
2. Irverne White	21	" "	1946	Intact
3. (234 E. 54th St., L.A.				
Not legalized				
1. None				
2.				

* CHILDREN	AGE	RESIDING	SUPPORT
1. Frederick H. Gray	20	W/Subject's mother	Self
2. Rubbie Gray	18	W/Subject's wife	Same
3. Gloria Gray	13	W/sisters	"
4. Edna Gray	11	W/Subject's wife	"

MILITARY Service branch USAF Rank: Pvt. Verif: Yes
Ser. No. 38688261 Date entered: 6/6/44 Date discharged: 6/28/46 Type discharge: Honorable. Overseas duty: None
Disciplinary: 1 SCM: Loitering 1 SCM: AWOL Disability: None

OCCUPATION: Handyman Length Exp.: Verif: S.S. No. 457-26-4822

1. 1960-61 (6 mos) Kitchen helper, V.A., Sawtelle & Wilshire Blvd., L.A.
2. 1941-56 (15 yrs) Handyman, Ranbow Florist, 306 Auston St., Marshall, Texas.
3.

Disability: Union: None

RELIGION Inmate: Baptist Wife: Baptist Parents: Baptist

FINANCIAL Status: Destitute
Fines & judgments: None

ALCOHOL:
Heavy drinking—related to offense

NARCOTICS: None x Heroin— Other Opiate— Addict— User— Suspect— Marijuana—
1st used: Rate of use:

COMMENTS: (C) States 6 jail sentences.
*Edmond Gray (11); Gary Gray (10); Juliel Gray (8) w/Subject's wife; Marlon Gray (9) W/sisters; Dorothy Gray (6); Loretta Gray (4); Roneal Gray (2); Ronett Gray (9 mos) W/Subject's wife.

GRAY A-72939 7-2-62 fcm 3

RECEPTION GUIDANCE CENTER, CHINO, CALIFORNIA

SOCIAL EVALUATION

Gray gives the impression of being a very passive meek little man, who stares at the floor the larger part of the time during the interview and only occasionally looked up to answer questions. He does not volunteer information, but seems to have a rather difficult time in finding words for expression.

Gray comes from a rather large family and his father died in 1933. Although Gray was about 20 years old at the time he continued to live with his mother although he was self-supporting. Gray indicates that the family lived in a rural area and operated a farm and the children had to work extremely hard from a very early age. However, he indicates that his relationship with both his father and mother was quite satisfactory, and he continues to be in close contact with both his mother and his siblings.

Gray has been married on two separate occasions, his first marriage ending in divorce in 1946. There were two children of this union, and the older, a son, is living with Gray's mother in the Los Angeles area. The daughter continues to reside with Gray's first wife. He remarried in 1946 and there are ten children of this union, although two are living with relatives in different parts of the country.

Gray seems to be retarded both mentally and emotionally. He has a great deal of aggression and hostility, although during sobriety he seems able to control these emotions. However, under very minor stress, and under the influence of alcohol he becomes extremely aggressive. This aggression is uncontrolled and has resulted in the present serious offenses. Apparently there is indication of organic brain damage which complicates his inability to function adequately under stress.

Gray served in the Air Force from 1944 until 1946 receiving an honorable discharge. However records indicate that he had two summary courts-martial during this period both involving restrictions and reductions in pay.

Basically Gray appears to be a very dull, inadequate individual unable to function adequately even under minimum stress, and with a great deal of aggression which becomes uncontrolled when he is under the influence of alcohol. This is complicated by the possibility of organic brain damage and perhaps continuing deterioration.

RECOMMENDATIONS: Transfer: San Quentin
Custody: Medium

7-10-62 Eva White, CC I

GRAY A-72939 RGC CHINO 7-11-62 am 4

• • •